Anor.[6] In our judgment that case had no bearing on the present case. The trial judge in that case found that there was no suggestion that the second defendant acted in exercise of his public duty or authority when he wrote the memorandum concerned. He therefore held that the second defendant had not acted in the exercise of his public duty or authority so as to entitle him to the protection of the Public Authorities Protection Ordinance, 1948.

Coming back now to the second ground of appeal, in our judgment the learned trial judge was quite right in saying that the defendant had not waived his right to have the action dismissed on the ground that it was time-barred either by asking that the originating motion be dismissed for procedural reasons or by applying for the action to be dismissed before the statement of claim was filed.

As regards the third ground of appeal, counsel for the appellant contended that, in dealing with an application to strike out a statement of claim on the ground that it discloses no reasonable cause of action, the court must assume whatever is stated in the statement of claim to be true. In this connection he cited the case of *Mooney & Ors.* v. *Peat, Marwick, Mitchell & Co. & Anor.*[7] The view which we took, as we have already stated above, was that this was a point which was not necessary for the judge to decide in order to dismiss the action, although he was right in saying that there could be no reasonable cause of action so long as there remained on record the appellant's conviction for criminal breach of trust, which was the basis for his dismissal from service.

For the reasons we have stated we dismissed this appeal with costs.

Appeal dismissed.

Solicitors: *Sri Ram, Chan & Chia.*

PUBLIC PROSECUTOR v. DATUK HARUN BIN HAJI IDRIS & ORS.

[O.Cr.J. (Abdoolcader J.) August 10, 1976]

[Kuala Lumpur — Federal Territory Criminal Trials Nos. 31 and 32 of 1976]

Criminal Law and Procedure — Transfer of case to High Court on certificates issued by Public Prosecutor under s. 418A of the Criminal Procedure Code (F.M.S. Cap. 6) — Whether valid — Whether s. 418A of Criminal Procedure Code unconstitutional and void — Inconsistency with Constitution — Criminal Procedure Code (F.M.S. Cap. 6), ss. 417, 418A — Federal Constitution, arts. 8 and 145(3).

In these cases the accused were originally charged in the Sessions Court. The cases were transferred to the High Court on certificates issued by the Public Prosecutor under the provisions of section 418A of the Criminal Procedure Code. Counsel for the accused contended that section 418A of the Criminal Procedure Code violated Article 8(1) of the Federal Constitution and was therefore void and unconstitutional.

Held: (1) Article 8(1) of the Federal Constitution permits reasonable classification founded on intelligible differentia having a rational relation or nexus with the policy or object sought to be achieved by the statute or statutory provision in question. In this case section 418A of the Criminal Procedure Code conferred discretionary power on the authority without laying down any policy or disclosing any tangible or intelligible purpose and thus conferred unguided and arbitrary powers enabling the authority to discriminate;

(2) while the Public Prosecutor has power under Article 145(3) of the Federal Constitution, exercisable to his discretion, to institute conduct or discontinue any proceedings the Public Prosecutor cannot in the exercise of his discretionary powers discriminate at will and infringe the provisions of Article 8(1) as judicially determined in the matter of clarification, differentia and nexus;

(3) in this case the accused have been prejudiced, as if they are tried in the High Court, the High Court has greater powers of punishment than the Sessions Court;

(4) section 418A of the Criminal Procedure Code as it is worded and as it stands is therefore unconstitutional and void by virtue of the provisions of Article 8(1) of the Federal Constitution and equally so the certificates issued by the Public Prosecutor thereunder for the transfer of the cases to the High Court. The transfer effected thereby is accordingly of no effect;

(5) it is open to the Public Prosecutor to apply for the transfer of the cases to the High Court under section 417 of the Criminal Procedure Code and such application will then be considered on its merits.

Cases referred to:—

(1) *State of Madhya Pradesh* v. *G.C. Mandawar* A.I.R. 1954 S.C. 493.

(2) *Raja Surapayal Singh* v. *Uttar Pradesh Government* A.I.R. 1951 All 674 at p. 690.

(3) *Lindsley* v. *National Carbonic Gas Co. Ltd.* (1911) 220 U.S. 61.

(4) *State of Bombay* v. *F.N. Balsara* A.I.R. 1951 S.C. 318, 326.

(5) *Ram Krishna Dalmia* v. *Justice S.R. Tendolkar* A.I.R. 1958 S.C. 538, 547.

(6) *Jyoti Pershad* v. *Administrator of the Union Territory of Delhi* A.I.R. 1961 S.C. 1602.

(7) *Kedar Nath Bajoria* v. *State of West Bengal* A.I.R. 1953 S.C. 404, 407.

(8) *Chiranjit Lal Chowdhuri* v. *Union of India* A.I.R. 1950 S.C. 41.

(9) *State of West Bengal* v. *Anwar Ali Sarkar* A.I.R. 1952 S.C. 75, 79-81, 85, 89-90, 92.

(10) *Kathi Raning Rawat* v. *State of Saurashtra* A.I.R. 1952 S.C. 123.

(11) *Shree Meenakshi Mills Ltd.* v. *A.V.V. Sastri* A.I.R. 1954 S.C. 13.

(12) *Bidi Supply Company* v. *Union of India* A.I.R. 1956 S.C. 479.

(13) *Mohamed Sidin* v. *Public Prosecutor* [1967] 1 M.L.J. 106.

(14) *Srinivasa Aiyar* v. *Saraswathi Ammal* A.I.R. 1952 Mad. 193, 195.

(15) *Anjali* v. *State of West Bengal* A.I.R. 1952 Cal. 825, 829.

(16) *Pillai* v. *Mundayanake* [1953] A.C. 514.

(17) *In re Bhupalli Malliah* A.I.R. 1959 And. Pra. 477.

(18) *Pride of Derby* v. *British Celanese Ltd.* [1953] 1 Ch. 149, 167.

(19) *Long bin Samat & Ors.* v. *Public Prosecutor* [1974] 2 M.L.J. 152.

(20) *Matajog Dobey* v. *H.C. Bhari* A.I.R. 1956 S.C. 44.

(21) *Indira Nehru Gandhi* v. *Raj Narain* A.I.R. 1975 S.C. 2292.

(22) *Moti Ram* v. *Union of India* A.I.R. 1966 H.P. 25, 31, 32.

(23) *James* v. *Commonwealth of Australia* [1936] A.C. 578, 614.

(24) *Devi Das Gopal Krishnan* v. *State of Punjab* A.I.R. 1967 S.C. 1895, 1901.

(25) *Somnath Misra* v. *Union of India* A.I.R. 1969 Orissa 37, 42.

(26) *Public Prosecutor* v. *Fan Yew Teng* [1973] 2 M.L.J. 1, 3.

(27) *Sahibzada Syed Mohamed Amirabbasi* v. *State of Madhya Bharat* A.I.R. 1960 S.C. 768.
(28) *Ujjam Bai* v. *State of Uttar Pradesh* A.I.R. 1962 S.C. 1621.
(29) *Naresh Sridhar Mirajkar* v. *State of Maharashtra* A.I.R. 1967 S.C. 1.
(30) *Jagmohan Singh* v. *State of Uttar Pradesh* A.I.R. 1973 S.C. 947.
(31) *Ram Dial* v. *State of Punjab* A.I.R. 1965 S.C. 1518.
(32) *Lachmandas Kewalram Ahuja* v. *State of Bombay* A.I.R. 1952 S.C. 235, 242.
(33) *Barbier* v. *Connolly* (1885) 113 U.S. 27.
(34) *Dwarakadas Shrinivas* v. *Sholapur Spinning and Weaving Co. Ltd.* A.I.R. 1954 S.C. 119.
(35) *Yick Wo* v. *Hopkins* (1886) 118 U.S. 356.
(36) *Snowden* v. *Hughes* (1944) 321 U.S. 1, 8, 11-12, 15, 16.

CRIMINAL TRIALS.

Tan Sri Datuk Haji Mohamed Salleh bin Abas, Solicitor-General (*Abu Talib bin Othman* and *Datuk Haji Abdullah bin Ngah* with him) for the Public Prosecutor.

R.R. Chelliah (*Sri Ram, Tuan Haji Suhaimi* and *P. Vijandran* with him) for the 1st accused.

Edgar Joseph Jr. (*R. Rajasooria* and *Abdul Kadir bin Kassim* with him) for the 2nd accused.

Jag-Jit Singh (*Yeoh Poh San* and *Anthony Martin Sebastian* with him) for the 3rd accused.

Abdoolcader J. (delivering oral judgment):

1. *Preliminary*

These two cases involving charges against the three accused for forgery and criminal breach of trust were transferred to the High Court in Kuala Lumpur from the Sessions Court in the Federal Territory on certificates issued by the Public Prosecutor under the provisions of section 418A of the Criminal Procedure Code ("the Code") enacted and added to the Code by the Criminal Procedure Code (Amendment and Extension) Act, 1976 and operative on January 10, 1976.

Counsel for the 2nd accused, with whom counsel for the other two accused associate themselves, has at the outset of this joint trial raised the contention that section 418A of the Code violates Article 8(1) of the Federal Constitution and is therefore unconstitutional and void by virtue of the provisions of Article 4(1) which provides that the Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with the Constitution shall, to the extent of the inconsistency, be void.

The question raised before me therefore resolves into the determination of the constitutional validity of section 418A of the Code in relation to the provisions of Article 8(1) of the Constitution.

2. *Principles in considering the challenge to the constitutional validity of the impugned section.*

In considering the matter in issue the principles to be borne in mind are three-fold:

Firstly, there is a presumption — perhaps even a strong presumption — of the constitutional validity of the impugned section with the burden of proof on whoever alleges otherwise.

Secondly, the presumption is not however to be carried to the extent or stretched for the purpose of validating an otherwise invalid law, and if the force of Article 8(1) bears sufficiently strongly upon and against that presumption, it must then necessarily bend, break and give way under that force.

And thirdly, for this purpose a statute or statutory provision must be examined on its own merits and not by comparison with other similar provisions (*State of Madhya Pradesh* v. *G.C. Mandawar*).[1]

3. *The law regarding Article 8(1) of the Constitution.*

Article 8(1) of the Constitution provides that:

"All persons are equal before the law and are entitled to the equal protection of the law."

'Equality before the law' means the equal subjection of all persons to the law (*Raja Surapayalsingh* v. *Uttar Pradesh Government*)[2] (at p. 690), but 'equal protection of the law' does not mean that all laws must be uniform and as judicially interpreted in the United States of America and India it means that a law may not discriminate for or against a person or class unless there is a rational basis for such discrimination.

The general basic principle culled from the authorities and judicially determined, succinctly put, is that Article 8(1) permits reasonable classification founded on intelligible differentia having a rational relation or nexus with the policy or object sought to be achieved by the statute or statutory provision in question.

The principles of classification and tests that have been applied by the Supreme Court and High Courts of India have in fact been adopted from decisions of the Supreme Court of the United States of America and are well defined and set out in the oft-quoted American case of *Lindsley* v. *National Carbonic Gas Co. Ltd.*[3] and in the Indian Supreme Court cases of *State of Bombay* v. *F.N. Balsara*[4] (at p. 326 per Fazal Ali J.), *Ram Krishna Dalmia* v. *Justice S.R. Tendolkar*[5] (at p. 547) and in particular in *Jyoti Pershad* v. *Administrator of the Union Territory of Delhi*.[6]

In *Jyoti Pershad*[6] the principles were restated in slightly different terms, and the second proposition formulated therein is to the effect that the statute or rule may not enact a discriminatory rule, but might confer discretionary power on an authority without laying down any policy, or disclosing any tangible or intelligible purpose, thus clothing the authority with unguided and arbitrary powers enabling the authority to discriminate, and that such a statute or rule would violate Article 14 of the Indian Constitution (our Article 8(1)) and must be struck down. That basically is the contention put forward on behalf of the accused in this case in relation to section 418A of the Code.

I cannot therefore accept the contention advanced by the Solicitor-General that since *Kedar Nath Bajoria* v. *State of West Bengal*[7] in 1953, the Indian Supreme Court has done away with the necessity of any object or policy in the statute, as *Jyoti Pershad*[6] in 1961 and *Ram Krishna Dalmia*[5] in 1958 clearly show otherwise.

It might perhaps be convenient at this stage to extract and refer to the pertinent principles propounded

on this issue and appearing in leading Indian authorities, transposing for this purpose our Article 8(1) for Article 14 of the Indian Constitution.

(i) *Chiranjit Lal Chowdhuri* v. *Union of India.*[8]

A classification applying even to a single person or corporation is permissible provided it has a reasonable relation to the object of the law.

(ii) *State of West Bengal* v. *Anwar Ali Sarkar.*[9]

(a) The basis of the classification must appear in the statute itself; it cannot be presumed to exist.

(b) There is no burden on the aggrieved person to show that the intention of the legislature was hostile or inimical. It would be dangerous to introduce a subjective test in a matter as to which the Article itself lays down only a clear objective test.

(c) A law which enables the executive to make an arbitrary discrimination is as bad as a law which itself creates such discrimination. Both are equally hit by Article 8(1).

(d) Article 8(1) can be invoked not only against laws but also against executive orders which are discriminatory.

(e) Article 8(1) can be invoked not only against substantive provisions of law but also against discriminatory rules of procedure.

(iii) *Kathi Raning Rawat* v. *State of Saurashtra.*[10]

(1) There are three kinds of statutes which have to be considered under Article 8(1):

(a) Those which lay down the object and policy of the legislature and also make a classification.

(b) Those which lay down the object and policy, but leave classification to the executive.

(c) Those which do not lay down any clear policy and yet leave the power of selection to the executive.

A law under this last category bears on its very face the stamp of unconstitutionality and the mischief lies in the statute itself and is inherent in its very structure. Such a statute is void as being in clear conflict with Article 8(1) and it follows that every order or action of the executive under such a statute is invalid and has to be put aside.

(2) For the purposes of Article 8(1), guidance is essential to the executive for the exercise of discretionary power. Unrestrained power of selection without a guiding policy offends Article 8(1).

(3) *Bona fide* application of discriminatory law is immaterial.

(iv) *Kedar Nath Bajoria* v. *State of West Bengal*[7] (at p. 407 per Sastri C.J.).

If a law does not lay down any clear policy and leaves it to the unfettered and unregulated discretion of the executive to apply the special procedure created by it to any person or group of persons at its will and pleasure, such law is a clear negation of Article 8(1). The mischief lies in the fact that in the absence of any regulative principle or policy the uncontrolled discretion of the executive is the sole determining factor for the application of that law.

(v) *Shree Meenakshi Mills Ltd.* v. *A.V.V. Sastri.*[11]

Article 8(1) forbids the executive being authorised to pick and choose between alternative rules of procedure for application to persons falling under the same class.

(vi) *Bidi Supply Company* v. *Union of India.*[12]

(a) A statute which gives uncontrolled power to the executive to make an order against any person at its will and pleasure is hit by Article 8(1).

(b) The test is whether there is or is not any substantial discrimination between persons in the same situation, and that is a question of fact to be determined on the circumstances of each case as it arises.

(vii) *Ram Krishna Dalmia* v. *Justice S.R. Tendolkar.*[5]

Statutes which neither name the persons or things to whom they are intended to apply nor make any basis of classification and yet leave uncontrolled power of applying the statute to the executive, are bad not because they do not themselves make a classification but because as a result of the absence of any guiding principle of policy they enable discrimination by the executive between persons or things belonging to the same group.

When a statute delegates power to classify, it is void if the power given is arbitrary or covers a classification going beyond the object of the statute. Arbitrary selection can never be justified by calling it classification.

Article 8(1) was considered by the Federal Court in *Mohamed Sidin* v. *Public Prosecutor*[13] when the question of the validity of the Emergency (Criminal Trials) Regulations, 1964 made under the Emergency (Essential Powers) Act, 1964 was raised, and it was held that there was a nexus in the Act itself and the regulations between the criminal trial or classification of criminal trials to be tried under the special procedure provided in the regultions and the object of the Act. The Federal Court therefore has accepted and approved the principles and tests of classification I have adverted to.

It would also perhaps appear not to be without some signifiance for the purposes of considering the importance of Article 8(1) that it is omitted from the provisions of Article 149(1) which provide for the validity of legislation against subversion made under that constitutional provision notwithstanding its inconsistency with the provisions of Articles 5, 9 or 10 which also involve fundamental liberties under Part II of the Constitution. Such then is the sanctity of Article 8(1) that no such law enacted by virtue of Article 149(1) can therefore notwithstanding its special nature violate its provisions.

It would in my view be of some considerable assistance in order to fully comprehend the ambit and pervasive purport of Article 8(1) to consider the provisions and effect of Article 8(2), the material part of which prescribes:

"*Except as expressly authorised by this Constitution*, there shall be no discrimination against *citizens* on the ground *only* of *religion, race, descent* or *place of birth* in any law...."

Article 8(2) contains a specific and particular application of the principle of equality before the law and equal protection of the law embodied in Article 8(1). Therefore, discrimination against any citizen only on the grounds of religion, race, descent or place of birth or any of them in any law is prohibited under Article 8(2) and such discrimination cannot be validated by having recourse to the principle of reasonable classification which is permitted by Article 8(1) (*Srinivasa Aiyar* v. *Saraswathi Ammal*[14] at p. 195; *Kathi Raning Rawat* v. *State of Saurashtra*[10] at p. 125).

In cases not covered by Article 8(2), the general principle of equality embodied in Article 8(1) is attracted whenever discrimination is alleged, and if accordingly discrimination is alleged on a ground other than those specified in Article 8(2), the case must be decided under the general provisions of Article 8(1). Article 8(1) and (2) must be read together, their combined effect is not that the State cannot discriminate or pass unequal laws, but that if it does so, the discrimination or the inequality must be based on some reasonable ground (Article 8(1)), and that, due to Article 8(2), religion, race, descent or place of birth alone is not and cannot be a reasonable ground of discrimination against citizens. The word 'discrimination' in Article 8(2) involves an element of unfavourable bias.

The use of the word 'only' in Article 8(2) connotes that what is discountenanced is discrimination purely and solely on account of all or any one or more of the grounds mentioned in that clause. A discrimination based on any of these grounds and also on other grounds is not affected by Article 8(2) though it may be hit by Article 8(1) (*Anjali* v. *State of West Bengal*[15] at p. 829). It would also be of some interest in this context to refer to for comparison the decision of the Privy Council in *Pillai* v. *Mundayanake*[16] where the doctrine of pith and substance was considered and applied.

4. *Powers of the Public Prosecutor in criminal prosecutions.*

Article 145(3) of the Constitution reads:

"The Attorney-General shall have power, *exercisable at his discretion*, to *institute*, *conduct* or *discontinue* any proceedings for an offence...."

Section 376(i) of the Code provides:

"The Attorney-General shall be the Public Prosecutor and shall have the *control* and *direction* of all *criminal prosecutions and proceedings* under this Code."

This section must certainly be circumscribed by and read subject to and in the light of the provisions of Article 145(3) of the Constitution which in effect only restate and are declaratory of the existing powers and duties of the Attorney-General in relation to criminal prosecutions and proceedings at the date the Constitution was promulgated.

The Solicitor-General lays considerable stress on the wide powers of the Attorney-General in England in their historical context, stating he is a master to himself, and submits the same applies to the Attorney-General of Malaysia. It must be remembered however that the constitutional rights, powers and duties of our Attorney-General are specifically spelt out in Article 145 of the Constitution and in particular in clauses (2) and (3) thereof, and it is clause (3) of that Article which is relevant and material to the issue before me and which circumscribes and specifies the limits of his functions and powers in relation to criminal proceedings. It would be dangerous therefore to go beyond this specific constitutional provision and rely on the position in England by historical analogy to justify any action of the Attorney-General in our country which does not come within the ambit of that provision.

It would now be necessary to consider the connotation of the words 'institute' and 'conduct' in Article 145(3).

'Institute' in Article 145(3) cannot cover the subject-matter of section 418A of the Code, as the Solicitor-General contends. It must necessarily refer to the commencement of criminal proceedings and prosecutions and not to such as have already been instituted and are pending or to criminal procedure as such. It may well be, as the Solicitor-General submits, that the Public Prosecutor has power, apart from the application of the provisions of sections 417 and 418A of the Code, to direct any case triable in the Magistrate's or Sessions Court to be tried in the High Court after a preliminary inquiry. This power to so direct would, if exercised, fall squarely within his discretion to *institute* and *conduct* criminal prosecutions and proceedings. The position under section 418A of the Code is wholly different as it has no relation to the institution and for that matter the conduct of criminal proceedings but instead clearly and expressly concerns and relates to criminal cases already commenced and *pending* in the subordinate courts.

'Conduct' in Article 145(3) cannot but refer to the conduct of prosecutions in court, as it indeed appears *ipsissimis verbis* in section 377 of the Code. And 'control and direction' in section 376(i) of the Code is in respect of all criminal prosecutions and proceedings, and not of criminal procedure or the jurisdiction of the courts.

'Conduct' of criminal prosecutions and proceedings in Article 145(3) cannot connote the regulation of criminal procedure or of the jurisdiction of the courts or the power or discretion to do so. Any contrary contention would in effect in my view be tantamount to the suggestion of the Public Prosecutor arrogating to himself the legislative powers vested in Parliament under Item 4 and in particular paragraph (b) thereof in List I (Federal List) in the Ninth Schedule to the Constitution, with perhaps also the not inconceptible resultant intrusion or at least a more than peripheral incursion into the sphere of Article 121(1) of the Constitution which provides that the judicial power of the Federation is vested in two High Courts and in such inferior courts as may be provided by federal law — namely, the Subordinate Courts Act, 1948 which specifies the subordinate courts and their respective civil and criminal jurisdiction.

Pursuing its signification, 'to conduct' means 'to lead, guide, manage' (*In re Bhupalli Malliah*;[17] *Pride of Derby* v. *British Celanese Ltd.*[18] at p. 167 per Lord Evershed, M.R.). It conveys the idea of leading and guiding, that is to say, the person who conducts the prosecution determines all important questions of policy involved in the course of the trial and the attitude

to be adopted by the prosecution towards material objections raised or demands made by the accused with respect to the evidence.

The effect of Article 145(3) of the Constitution and section 376(i) of the Code was considered by the Federal Court in *Long bin Samat & Ors.* v. *Public Prosecutor.*[19] That was a case involving a charge under section 324 of the Penal Code for voluntarily causing hurt but the evidence adduced before the Magistrate disclosed an offence under section 326 of the Penal Code for voluntarily causing grevious hurt. The appellant was convicted under section 324 and appealed on the ground that the trial was a nullity since the Magistrate had no jurisdiction to hear the case as the evidence disclosed an offence under section 326. The Federal Court held on a reference that it was well within the wide discretion vested in the Public Prosecutor to prefer a charge for a less serious offence than what the evidence in fact disclosed. This was clearly in my view a perfectly proper application of the provisions of Article 145(3) of the Constitution and section 376(i) of the Code as the Public Prosecutor is not open to question by anyone if in the exercise of his discretion to institute and conduct prosecutions he chooses to prefer a charge for a lesser offence in the particular circumstances of a case.

The examples of discretion vested in the Public Prosecutor the Solicitor-General refers to in relation to the issue and refusal of sanctions for prosecution and the withdrawal of charges pertain to the institution and conduct of prosecutions and not to the regulation of criminal procedure.

If indeed the Attorney-General who by virtue of the provisions of section 376(i) of the Code is the Public Prosecutor is as omnipotent as the Solicitor-General contends by virtue of his discretionary powers under Article 145(3) and section 376(i) of the Code, then in my view there would be no point or purpose in including the Public Prosecutor in the provisions of section 417 of the Code in the matter of applying to the High Court for a transfer or other order thereunder, let alone enacting separately special powers exercisable by him under section 418A of the Code, as the Public Prosecutor would on the contention advanced be in a position by virtue of the very provisions of the Constitution to virtually dictate the venue of trial and trial court itself when initially applying for a summons or warrant, and the logical extension or rather perhaps the *reductio ad absurdum* of any such argument would be that the Public Prosecutor could indeed even specify any particular Magistrate, President or Judge for that matter to hear any particular case — a situation which I would consider to be absolutely inconceivable even to the most ardent advocates of any such contention.

In this context, the provisions of section 197 of the Indian Criminal Procedure Code (on which the Code is based but which has since been repealed and re-enacted in 1973) provide an interesting contrast. That section provides for the trial of Judges, Magistrates and certain public officials only with the previous sanction of the Central or State Government as the case may be, and subsection (2) thereof provides that the Central or State Government may determine the person by whom and the manner in which the prosecution is to be conducted and also specify the court of trial. The validity of this section which was challenged in relation to Article 14 of the Constitution of India (which equates with our Article 8(1)) was upheld by the Supreme Court of India in *Matajog Dobey* v. *H.C. Bhari*[20] as the discrimination was based upon a rational classification for the protection of public servants from harassment in the discharge of official duties.

In any event, in the exercise of his discretionary powers, the Public Prosecutor cannot discriminate at will and infringe the provisions of Article 8(1) as judicially determined in the matter of classification, differentia and nexus. If he can indeed do so, there would be no reason why in the exercise of his powers he cannot even infringe the specific provisions of Article 8(2). It is significant, in my view, that, unlike Article 8(2), Article 8(1) is not prefaced by the clause "Except as expressly authorised by this Constitution". And equally significant is the fact that neither is there a *non obstante* clause in Article 145(3) to eliminate the application of Article 8(1) to its provisions. I would add that I respectfully associate myself with what Chandrachud J., held in *Indira Nehru Gandhi* v. *Raj Narain*[21] and so declare that the equality provision in Article 8(1) is part of the basic structure of the Constitution and a basic feature thereof. In that case two of the other Judges of the Indian Supreme Court did not deal with that question, one was equivocal and only Mathew J., held otherwise.

The Solicitor-General submits that if the Constitution allows discrimination, any such discrimination made must be upheld. That in fact is the position under Article 8(5) which expressly and specifically excepts provisions in respect of the five matters specified therein from being invalidated or prohibited by Article 8. Article 145(3) does not however in terms make any classification whatsoever or allow discrimination but only endows the Attorney-General with discretionary powers in relation to the matters therein stipulated and is in my view subject to and must necessarily harmonise with the provisions of Article 8(1). The Solicitor-General in support of his proposition that any discrimination allowed by the Constitution must be upheld refers to two Indian cases, but there it was not discretionary discrimination at will that was allowed but classification that was made by the Constitution. A classification made by the Constitution itself cannot of course be struck down as violating Article 8(1). Accordingly in *Moti Ram* v. *Union of India*[22] (at p. 31, 32), the distinction made between the State and Union Territories by section 54 of the Union Territories Act, 1963 was held to be valid as this classification appears in the Indian Constitution itself. There is no and cannot indeed be any provision in our or the Indian Constitution which provides for or allows discretionary discrimination at will and pleasure without any reasonable classification.

The Constitution is not to be construed in any narrow and pedantic sense (*James* v. *Commonwealth of Australia*[23] at p. 614 per Lord Wright) but it is equally true that this does not mean that the court is at liberty to stretch or pervert the language of the Constitution in the interests of any legal or constitu-

tional theory of omnipotence of the Attorney-General in matters relating to criminal procedure and the jurisdiction of the courts.

Article 145(3) cannot therefore in my view on any reasonable and acceptable interpretation provide, as the Solicitor-General contends, any form of licence to override the provisions of Article 8(1) which is a fundamental liberty under Part II of the Constitution, and perhaps even also those of Article 121(1), and at the very least, in any event, applying the principle of harmonious construction of the Constitution — an accepted canon of constitutional interpretation, effect should be given to all these provisions as far as possible, and on that basis alone any exercise of discretionary powers by the Attorney-General must necessarily relate to reasonable classification and not arbitrary selection.

No resort can be had to Article 145(3) of the Constitution to ascertain the policy or guidance for the exercise of discretionary powers by the Attorney-General even if there were any. In *Devi Das Gopal Krishnan* v. *State of Punjab*,[24] the Supreme Court of India reiterated (at p. 1901) that a liberal construction of an impugned statute should not be carried by the courts to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on executive authorities, and that it is the duty of the court to strike down without any hesitation any arbitrary power conferred on the executive by the legislature. The Supreme Court in that case in considering the provisions of a section of a statute conferring uncontrolled power on the provincial Government to levy a turnover tax at such rates as the Government might direct without any guidance or policy laid down in that respect in the statute itself, held that such a policy could not be gathered from the constitutional provisions as this would destroy the doctrine of excessive delegation and would also sanction conferment of power by the legislature on the executive without laying down any guidelines in the statute (*ibid*, at p. 1901).

5. *Section 418A of the Code.*

Section 418A, as I have already said, was added to the Code early this year and provides:

"418A. (1) Notwithstanding the provisions of section 417, the Public Prosecutor may in any particular case triable by a criminal court subordinate to the High Court issue a certificate requiring the court before which the case is pending to remove it to the High Court at such place as may be specified in the certificate and to cause the accused person to appear or be produced before the said High Court.

(2) The power of the Public Prosecutor under sub-section (1) shall be exercised by him personally.

(3) Upon receipt of the certificate the court before which the case is triable shall without holding a preliminary inquiry under Chapter XVII transmit the case to the High Court mentioned in the certificate and cause the accused person to appear or be brought before such High Court as soon as may be practicable; and thereafter the provisions of sub-section (3)(b) and sub-section (4) of section 417 shall apply to such case *mutatis mutandis*."

Section 418A in its requirements would appear to be couched in somewhat peremptory and mandatory language, and, I would add, is not without a tinge of polite arrogance. This section, as it is worded and as it now stands, relates to any particular criminal case *already instituted and pending* in a subordinate court, and *ex facie* purports to give unrestrained power of selection to the Public Prosecutor without any guide, object or apparent policy in the section itself or anywhere else in the Code.

I am unable to accept the submission of the Solicitor-General that it is not necessary to have an object or policy in section 418A. He further submits that there is indeed classification in the section itself — namely, 'any particular case triable by a criminal court subordinate to the High Court'. He goes on to say that there would then be sub-classification by the Public Prosecutor as each case arises, using his own discretion. In my view, what the Solicitor-General refers to is neither a class nor classification at all as the section relates to 'any particular case' (and not to a class or classes of criminal cases) out of all criminal cases triable in the subordinate courts, and even the latter would only be a general pool from which for the purposes of the application of the section classification should be made based on and having a rational relation to a policy or object. There can be no question of sub-classification as put by the Solicitor-General, as that would only be a euphemism for arbitrary selection by the Public Prosecutor in the exercise of an uncontrolled discretion. In any event, even if there were this nebulous semblance of classification as the Solicitor-General argues, it would certainly be too indefinite and vague and without any reasonable principles for selection to withstand the test of constitutional validity.

The presumption of constitutional validity would appear to be of little assistance in the case of a statutory provision where on the face of it there is no classification at all or no principles for selection based on intelligible differentia, and hostile discrimination is writ large on the face of the impugned provision.

The discrimination which is prohibited by Article 8(1) is treatment in a manner prejudicial as compared with another person similarly circumstanced by the adoption of a law, substantive or procedural, different from the one applicable to the other person (*Somnath Misra* v. *Union of India*[25] (at p. 42). In other words, Article 8(1) prohibits hostile discrimination, but for this purpose it is only the effect of the impugned legislation that is material and it is not necessary to prove that the legislature was actuated by a hostile intention or motive against any particular person or class of persons (*State of West Bengal* v. *Anwar Ali Sarkar*[9] (at pp. 89-90, 92 per Mukherjea J.; at p. 85 per Fazal Ali J.).

I now advert to the question as to whether in effect there would be any prejudicial effect as a result of the application of the provisions of section 418A to the accused in these two cases.

Counsel for the 2nd accused argues that the accused have been deprived of the advantage of a preliminary inquiry and, as a result, of not knowing the evidence they have to meet at the trial, and also of enjoying the chance of a *prima facie* case not being made out at such inquiry, relying on the judgment of Lord Salmon in the Privy Council in *Public Prosecutor* v. *Fan Yew Teng*[26] (at p. 3), but I am inclined to the view that there is not as much force in that contention as counsel

seeks to make out and that this complaint is not strictly pertinent in relation to the application of the provisions of section 418A and the cases under consideration since they are triable in the subordinate courts and no question of any preliminary inquiry would therefore arise in any event. It is true however that apart from the application of section 417 of the Code, the accused would be deprived of the advantage of a preliminary inquiry which would be their right under section 138 of the Code as a prelude to a trial in the High Court. Would there then be any other form of prejudicial effect on the accused as a result of the application of section 418A and the transfer of these cases to the High Court in the sense that they would be subject to substantial discrimination and different treatment from other persons similarly situated whose cases are also triable by a criminal court subordinate to the High Court?

The charges against the three accused in the Sessions Court at the time the Public Prosecutor's certificates were issued requiring the transfer of these cases to the High Court were for forgery under section 468 of the Penal Code and criminal breach of trust under section 409 of the Penal Code, but the charge of criminal breach of trust was amended in the High Court when these cases were brought before me on May 29 this year to one under section 406 of the Penal Code.

With regard to the forgery charge, this would be triable by the Sessions Court which can however only pass sentence not exceeding 5 years' imprisonment (section 64(1) of the Subordinate Courts Act, 1948) and a President of the Sessions Court conferred with special jurisdiction under section 63(3) of the Act can impose a term of up to 7 years' imprisonment which is the maximum term prescribed under section 468 of the Penal Code. But under this section a fine can also be imposed in addition to imprisonment but a President of the Sessions Court can only impose a fine not exceeding $10,000 and a President with special jurisdiction a fine not exceeding $20,000 (section 64(1) of the Act). There is no limit however to the amount of a fine the High Court can impose.

As to the criminal breach of trust charge pending in the Sessions Court under section 409 of the Penal Code at the time of the transfer to the High Court, the Sessions Court which can try this offence (section 63(1) of the Act) can only impose a maximum term of 5 years' imprisonment and a President with special jurisdiction a term of up to 7 years' imprisonment, but the High Court can impose any term up to the maximum of 20 years' imprisonment prescribed by the section. There is also additional liability to a fine and I have already referred to the unrestricted powers of the High Court as to the quantum imposable for a fine as opposed to the limits laid down for the Sessions Court.

The criminal breach of trust charge under section 406 of the Penal Code before the High Court is well within the jurisdiction of the subordinate courts for the purposes of imposing a term of up to the maximum of 3 years' imprisonment prescribed by that section, but the offence is punishable with imprisonment or with fine or with both, and the unlimited quantum for a fine imposable by the High Court once again assumes significance.

The Solicitor-General however seeks to reply, in relation to the question of the punishment that can be imposed, on the provisions of section 64(2) of the Act (the equivalent in respect of First Class Magistrates being section 87(2) thereof) empowering the Sessions Court to award the full punishment authorised by law for the offence on which a person is convicted and submits that that would solve the situation as to any prejudicial consequences arising. It is my view that that sub-section cannot in any way affect the position as it may or may not be invoked, and even so, it is in any event limited by considerations of any previous convictions or antecedents of the person concerned and requires reasons to be recorded for proceeding thereunder and also confirmation by the High Court of the exercise of the power thereunder by virtue of the provisions of section 37 of the Courts of Judicature Act, 1964. Again the imposition of full punishment under that sub-section cannot in my view affect the limits of a fine imposable by the Sessions Court as the offences in question in the instant two cases do not specify any ceiling on the quantum of the imposable fine which is therefore at large, and the limits set out in section 64(1) of the Act must accordingly still apply. Reliance on the applicability of section 64(2) of the Act would be as theoretical a possibility as the argument that the High Court could or might well impose even a lesser term of imprisonment or fine than the Sessions Court. It is my view that in considering this question of the jurisdiction and power of the court to impose punishment, the actual jurisdictional delimitations imposed by law must be taken into account and borne in mind. The proviso to section 64(1) of the Act was also referred to by Solicitor-General but he agrees that it is of no relevance to the cases now under consideration.

In addition to all those matters, there is the strange phenomenon of the superimposition of section 418A over and above the existing provisions of section 417 of the Code which enable *inter alios* the Public Prosecutor to apply to the High Court for the transfer of any particular criminal case to the High Court on specified grounds bearing reasonable classification with intelligible criteria related to the object of the section for the exercise of judicial discretion in making or refusing an order thereunder.

Under section 417 of the Code the ultimate decision as to whether any particular criminal case should be transferred from a subordinate court to the High Court does not depend merely on the arbitrary selection or whim of the Public Prosecutor but is determined ultimately on the proper exercise of judicial discretion by the High Court. The Supreme Court of India has held in *Sahibzada Syed Mohamed Amirabbasi Amirabbas* v. *State of Madhya Bharat*,[27] *Ujjam Bai* v. *State of Uttar Pradesh*,[28] *Naresh Sridhar Mirajkar* v. *State of Maharashtra*[29] and again recently in *Jagmohan Singh* v. *State of Uttar Pradesh*[30] that Article 14 of the Indian Constitution (our Article 8(1)) cannot be invoked in respect of judicial action. I would pause to observe that for reasons peculiar to its constitutional law the position is different in the United States of America where the judiciary is subject to the inhibition of the Fourteenth Amendment to its Constitution against the denial of the equal pro-

tection of laws which has exclusive reference to State (as opposed to Federal) action.

Even more curiously, section 417 of the Code which has long been in existence was re-enacted in toto at the same time as when section 418A was enacted. The original Bill for amending the Code had a minor amendment to the then existing section 417 but presumably in the Committee stage in the course of being passed by Parliament, section 417 was wholly re-enacted and section 418A added; both these new provisions do not therefore appear in the Bill.

The parallel co-existence of sections 417 and 418A would clearly seem to suggest that what the Public Prosecutor cannot achieve or hope to achieve under section 417 can be got round by resort to his plenary residuary powers under section 418A which is prefaced by a *non obstante* clause to this very effect, and this appears to me to demonstrate all the more the arbitrary nature of the impugned section in all its stark reality, particularly as section 418A covers only part of section 417 which is much wider in scope and broader in application. The Solicitor-General agrees that section 417(1)(cc) in fact covers what can be achieved under section 418A. Indeed there would appear to be nothing to prevent the Public Prosecutor having recourse to section 418A even when and immediately after an application under section 417 in respect of a particular criminal case has been refused by the High Court, and this the Solicitor-General in the course of his submission concedes is truly so.

No objects or reasons or other indication of any policy or guidance appear or indeed could appear in the original Bill before Parliament for amending the Code by enacting section 418A as that section does not, as I have indicated, appear in the Bill but only in the Criminal Procedure Code (Amendment and Extension) Act, 1976 when enacted. But in the course of his submission the Solicitor-General has produced an Explanatory Statement to amendments to be moved in Committee in Parliament by the Attorney-General regarding the re-enacted section 417 and the new section 418A, but paragraph 4 of that statement in my view only restates those provisions to be introduced and enacted in a summarised form and does not indicate the object or policy of those provisions as the Solicitor-General contends, but rather the effect and end result thereof by merely recapitulating them briefly.

The provision in sub-section (2) of section 418A that the Public Prosecutor has to exercise the power under sub-section (1) personally and the fact that this is not so in relation to an application by him under section 417 does not in my view affect the position or detract from the several considerations I have referred to and discussed and might indeed perhaps even exacerbate them. As I have said and I repeat, *bona fide* application of discriminatory law is immaterial.

In *Ram Dial* v. *State of Punjab*,[31] section 16(1) and section 14(e) of the Punjab Municipalities Act, 1911 both provided for the removal of a member of the Municipality in the public interest, but whereas under section 16 provision was made for hearing the member to be removed, no such provision was made by section 14(e) which was therefore more drastic than section 16(1), and as resort could be had to either section, section 14(e) was struck down as being clearly discriminatory and in violation of the equivalent of our Article 8(1).

In *Lachmandas Kewalram Ahuja* v. *State of Bombay*,[32] section 12 of the Bombay Public Safety Measures Act, 1947, in so far as it authorised the State Government to direct the trial by the Special Court under the special procedure provided by the Act of any particular case, was held by the Supreme Court of India to contravene the counterpart of our Article 8(1) and was therefore unconstitutional and void, and the notification under which only two particular cases were sent for trial by the Special Court was also bad for the same reason.

6. *Relevance of American constitutional law, theory, doctrines and cases.*

It is perhaps necessary and desirable to consider the relevance of American constitutional doctrines to our Constitution and the basis of some of the decisions of the Supreme Court of the United States of America, as in the course of his submission the Solicitor-General has made reference to several American Supreme Court decisions cited by Patanjali Sastri C.J., in his dissenting judgment in *State of West Bengal* v. *Anwar Ali Sarkar*[9] (at pp. 79-81) and also to some of those referred to *Basu's* Commentaries on the Constitution of India (5th edition) Vol. 1. The Solicitor-General has also referred to the police powers of Parliament to pass laws for the promotion of health, morality, public order and public tranquillity for the benefit of the people as a whole as the third exception to the equal protection of the law clause in Article 8(1), and he categorically submits that section 418A of the Code is nothing more than the exercise of police powers by Parliament in granting discretion to the Public Prosecutor.

It is of some importance in considering these matters to bear in mind the specific nature and provisions of the Constitution of the United States of America and the *rationes decidendi* behind some of the American Supreme Court decisions. The Fifth Amendment to the American Constitution has no equal protection clause but only a due process clause as protection against invasion of rights by the Federal authorities, and this amorphous concept of due process is elastic and broad enough to have been stretched in some American decisions to cover the concept of equal protection of the laws. Seventy five years later, the Fourteenth Amendment was introduced and section 1 thereof provides for due process and equal protection of the laws which has exclusive reference to and is aimed at State (as opposed to Federal) action to prevent discrimination by the individual States.

The United States Supreme Court has also developed the doctrine of eminent domain and also of police power which was left to the State and vested in the legislative branch of the State Governments. The Supreme Court has held that the equal protection clause in the Fourteenth Amendment cannot interfere with the police power of the State, that is to say, the power to make laws for the promotion of health, morality, public order and public tranquillity (*Barbier* v. *Connolly*),[33] provided there is no discrimination offending the equal protection clause.

The due process clause and the doctrines of eminent domain and police power are American constitutional concepts and have no place, in my view, in our Constitution just as they have none in the Indian Constitution, as the concepts of these doctrines are in fact expressly provided for in these Constitutions. For example, the American doctrine of eminent domain is in fact embodied in the provisions of Article 13 of our Constitution. Bose J., categorically stated in the Supreme Court of India in *Dwarakadas Shrinivas* v. *Sholapur Spinning and Weaving Co. Ltd.*[34] that there is no such doctrine of police power in the Indian Constitution. There are specific provisions in the Indian and the Federal Constitution expressly covering the sphere and purpose of this concept.

The other point to bear in mind in this connection is the United States doctrine of State action based essentially on the doctrine of federalism, to the effect that the United States Supreme Court will accept a restrictive interpretation of a State statute, *ex facie* violative of equal protection or of due process, by State authorities or courts, so as to avoid violation of these constitutional rights, particularly to cover exercises of racial discrimination. And conversely, if the law is on the face of it innocuous, but has been so construed and applied by officials or courts of the State as to violate any constitutional guarantee, the United States Supreme Court will strike it down. The emphasis in either case is therefore not on the text of the statute but on the construction and application given to it by the State.

The converse application of the State action theory, namely, where a statute, which is not necessarily vicious on the face, is struck down by the Supreme Court of the United States because of the unconstitutional application approved by the State is best illustrated by the celebrated case of *Yick Wo* v. *Hopkins*[35] which held that if a statute gives arbitrary powers of discretion to an official in the manner of the application of its provisions. it is tantamount to denial of equal protection and is accordingly void.

It would also be of some interest in this context to refer to the decision of the American Supreme Court in *Snowden* v. *Hughes*[36] to this effect, that where a statute is fair on the face of it and non-discriminatory and does not violate equality and an administrative or executive act is impugned, the discrimination must be intentional or purposeful. This point has of course no bearing on the matter before me as the challenge is to the constitutional validity of section 418A itself, and therefore even if what *Snowden* v. *Hughes*[36] decided is valid in relation to our Constitution, it does not in any event apply (*State of West Bengal* v. *Anwar Ali Sarkar*[9] at p. 85 per Fazal Ali J.; at p. 89-90, 92 per Mukherjea J.). But in any event an examination of *Snowden* v. *Hughes*[36] shows that the decision in that case was based on considerations relevant to the United States Constitution but irrelevant to our Constitution, and I would refer to the following passages in the judgments of Stone C.J. and Frankfurter J. (at pp. 8, 11-12, 15, 16):

Per Stone C.J.

"The unlawful administration by State officers of a State statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.... (p. 8).

It was not intended by the 14th Amendment and the Civil Rights Acts that all matters formerly within the exclusive cognisance of the States should become matters of national concern....

A construction of the equal protection clause which would find a violation of federal right in every departure by State officers from State law is not to be favoured." (p. 11-12).

Per Frankfurter J.

"The Constitution does not assure uniformity of decisions or immunity from merely erroneous action, whether by the Courts or the executive agencies of a State.... (p. 15).

Our question is not whether a remedy is available for such an illegality, but whether it is available in the first instance in a Federal Court. Such a problem of Federal judicial control must be placed in a historic context of the relationship of the Federal courts to the States, with due regard for the natural sensitiveness of the States and for the appropriate responsibility of State Courts to correct the action of lower State courts and State officials." (p. 16).

The test of intentional or purposeful discrimination by executive action was accordingly adopted in respect of unlawful administration by State officers of a State statute fair on its face because finding a denial of equality in the action of State officers, acting under State laws, would convert what were essentially State questions, to be decided by State Courts, into Federal questions to be decided by Federal Courts.

It is therefore essential to consider the relevancy of these concepts and decisions in the context of our Constitution before placing reliance on or applying them to local situations, as American decisions are often influenced by special considerations arising out of the peculiar provisions of the American Constitution bearing upon State and Federal jurisdiction, whereas our Constitution applies both to the Federation and the States and provides a curial and judicial system with Federal jurisdiction.

I would however reiterate that even though the American doctrine and exercise of police power is not inhibited by the equal protection clause in section 1 of the Fourteenth Amendment to the United States Constitution, it must not violate the equality of protection in that clause.

7. *Conclusion*

I cannot, therefore, in view of all the circumstances I have discussed and applying the established principles of law I have adumbrated, accept any of the three propositions formulated by the Solicitor-General, namely, (a) that there is reasonable classification in the impugned section 418A, (b) that even if there is none, the Public Prosecutor has absolute discretion under Article 145(3) of the Constitution, and (c) that in any event, the accused have not been prejudiced in any way.

The Court stands as arbiter in holding the balance between individuals and between the State and the individual, and will not have the slightest hesitation to condemn and strike down any statutory shelter for bureaucratic discrimination, any legislative refuge for the exercise of naked arbitrary power in violation of any of the provisions of the Constitution, and equally any executive action purported to be taken thereunder.

There exists side by side in the Code, as I have stated, sections 417 and 418A, both designed to achieve the same purpose in so far as it relates to the transfer to the High Court of criminal cases triable by a subordinate court, and I am accordingly constrained to conclude that section 418A of the Code violates Article 8(1) of the Constitution and must therefore be struck down as malignant in contrast with the benign provisions of section 417.

I therefore declare section 418A, as it is worded and as it now stands, unconstitutional and void by virtue of the provisions of Article 4(1) of the Constitution and equally so the certificates issued by the Public Prosecutor thereunder for the transfer of these cases to the High Court. The transfer effected thereby is accordingly of no effect.

Transmission to the High Court under the section 418A channel therefore fails but this is not necessarily the end of the matter, as an application by the Public Prosecutor for transmission under the section 417 channel is still open and available to him if he chooses to apply thereunder, in which event the court will consider the application within the ambit of that statutory provision and on its merits.

Order accordingly.

Solicitors: *R.R. Chelliah Bros.; Sri Ram, Chan & Chia; Adlan & Suhaimi; Joseph & Son; Dato' Rajasooria & Son; Kadir Kassim & Co.; Jag-Jit Singh & Co.*

PUBLIC PROSECUTOR v. OH KENG SENG

[O.Cr.J. (Ajaib Singh J.) August 17, 1976]
[Seremban — Criminal Trial No. 2 of 1976]

Criminal Law and Procedure — Transfer of case to High Court on certificates issued by Public Prosecutor under s. 418A of the Criminal Procedure Code (F.M.S. Cap. 6) — Whether valid — Whether s. 418A of the Criminal Procedure Code is in violation of art. 8(1) of the Federal Constitution — Whether transfer of case from Subordinate Court to High Court deprived the accused of the benefit of a preliminary enquiry — Whether accused has lost the right of appeal — Criminal Procedure Code (F.M.S. Cap. 6) ss. 417, 418 and 418A — Federal Constitution, arts. 4(1), 8(1) and 145(3).

In this case the accused was originally charged in the Sessions Court. The case was transferred to the High Court on certificates issued by the Public Prosecutor under the provisions of section 418A of the Criminal Procedure Code. Counsel for the accused contended that: (a) section 418A of the Criminal Procedure Code violated article 8(1) of the Federal Constitution and was therefore void and unconstitutional; (b) that by transferring the case from the Subordinate Court to the High Court the accused had been deprived of the benefit of a preliminary enquiry; and (c) that by transferring the case from the Subordinate Court to the High Court the accused lost the right of appeal.

Held: (1) section 418A of the Criminal Procedure Code is a valid law and it does not violate the provisions of article 8(1) of the Federal Constitution;

(2) the requirement as to the holding of a preliminary inquiry was specifically excluded when the Public Prosecutor invoked his powers under section 418A. All criminal trials which are heard in the subordinate courts are summary trials that is to say they are heard and determined by the court without holding a preliminary inquiry. The accused in this case had therefore not lost the benefit of a preliminary inquiry and he stood in no worse a position then any other person accused before the Subordinate Court;

(3) in this case the accused did not lose his right of appeal. As a matter of fact he was placed in an advantageous position for he could appeal to the Federal Court if he was convicted in the High Court whereas if his appeal from the lower court decision failed in the High Court that would be the end of the matter unless a certificate was issued by the High Court or by the Public Prosecutor on a point of law for the determination of the Federal Court;

(4) section 418A does not in any way discriminate against a particular offender or a particular offence. The section embraces all who appear before the subordinate courts charged with criminal offences.

Cases referred to:—

(1) *Public Prosecutor* v. *Datuk Harun bin Haji Idris & Ors.* [1976] 2 M.L.J. 116.

(2) *State of West Bengal* v. *Anwar Ali* A.I.R. 1952 S.C. 75.

RULING ON PRELIMINARY OBJECTION RAISED BY COUNSEL FOR ACCUSED.

Tan Sri Datuk Haji Mohamed Salleh bin Abas (Solicitor-General), *Azmel bin Haji Maamor* (Legal Adviser, Negri Sembilan) and *Razalli bin Hassan* (Deputy Public Prosecutor) for the Public Prosecutor.

Yeap Ghim Guan (*John Fernandez* with him) for the accused.

Ajaib Singh J.: The accused in this case is charged with uttering seditious words under section 4(1)(b) of the Sedition Act 1948 which is punishable with a fine not exceeding $5,000 or to imprisonment for a term not exceeding three years or with both such fine and imprisonment. The punishment for a subsequent offence is imprisonment for a term not exceeding five years. The accused was originally charged in the Sessions Court as his case fell within the criminal jurisdiction of the subordinate courts. However on March 3, 1976 the Attorney-General in his capacity as Public Prosecutor issued a certificate under the provisions of section 418A of the Criminal Procedure Code requiring the Sessions Court at Seremban where the accused was facing the charge to remove the case pending before that court to the High Court. The accused was accordingly brought and produced before this court for trial.

Before the commencement of the trial Mr. Yeap Ghim Guan for the accused raised a preliminary objection. He submitted that section 418A of the Criminal Procedure Code was *ultra vires* the Federal Constitution because it violated article 8(1) of the Constitution which provides that all persons are equal before the law and are entitled to the equal protection of the law. He submitted that the Constitution being the supreme law of the Federation as declared in article 4(1) any law passed after Merdeka Day which is inconsistent with the Constitution is void. This applied both to substantive and procedural laws. Mr. Yeap Ghim Guan contended that the powers given to the Public Prosecutor under section 418A were unrestricted and too wide. There was no control nor were there any guidelines for its exercise. No classification had been made under section 418A. The second ground for the objection taken by Mr. Yeap Ghim Guan was that by transferring the case from the subordinate court to the High Court the accused had been deprived of the benefit of a preliminary inquiry and this amounted to discrimination against the accused thereby violating the provisions of article 8. Thirdly it was submitted